

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
John Blair Marketing, Inc. : AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of Corporation :  
Franchise Tax under Article 27 of the Tax Law :  
for the Years 1977 & 1978.

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State of New York  
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 26th day of March, 1982, he served the within notice of Decision by certified mail upon John Blair Marketing, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John Blair Marketing, Inc.  
717 Fifth Ave.  
New York, NY 10022

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this  
26th day of March, 1982.

*Ernie R. Haglund*

*J. Vredenburg*

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :

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John Blair Marketing, Inc. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
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the Years 1977 & 1978.

State of New York  
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 26th day of March, 1982, he served the within notice of Decision by certified mail upon Barry N. Cooper the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Barry N. Cooper  
Touche, Ross & Co.  
1633 Broadway  
New York, NY 10019

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this  
26th day of March, 1982.

Bernie A. Hayland

J. Vredenburg

STATE OF NEW YORK  
STATE TAX COMMISSION  
ALBANY, NEW YORK 12227

March 26, 1982

John Blair Marketing, Inc.  
717 Fifth Ave.  
New York, NY 10022

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1090 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance  
Law Bureau - Litigation Unit  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Barry N. Cooper  
Touche, Ross & Co.  
1633 Broadway  
New York, NY 10019  
Taxing Bureau's Representative

## STATE TAX COMMISSION

for Redetermination of a Deficiency or for  
Refund of Franchise Tax on Business Corporations:  
under Article 27 of the Tax Law for the Years  
1977 and 1978. :

## DECISION

Petitioner, John Blair Marketing, Inc., 717 Fifth Avenue, New York, New York 10022, filed a petition for redetermination of a deficiency or for refund of franchise tax on business corporations under Article 27 of the Tax Law for the years 1977 and 1978 (File No. 30825).

A formal hearing was held before Doris Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 16, 1981 at 11:10 A.M. Petitioner appeared by Touche Ross & Co. (Barry N. Cooper, C.P.A.). The Audit Division appeared by Ralph J. Vecchio, Esq. (Paul A. Lefebvre, Esq., of counsel).

## ISSUE

Whether petitioner's failure to file franchise tax reports and to pay the taxes required to be shown thereon in a timely manner for the years at issue was due to reasonable cause, and not willful neglect.

## FINDINGS OF FACT

1. On November 20, 1979, petitioner, John Blair Marketing, Inc. ("Marketing") filed its franchise tax reports for the years 1977 and 1978 and remitted therewith taxes due, plus interest and penalties.

2. On or about January 25, 1980, petitioner filed two claims for credit or refund of corporation tax paid, requesting refund of all penalties, scheduled as follows:

	<u>1977</u>	<u>1978</u>	<u>TOTAL</u>
Penalty, estimated taxes	\$ 454.50	\$ 3,086.00	\$ 3,540.50
Penalty, late filing	3,024.00	20,655.00	23,679.00
Penalty, late payment	<u>1,377.00</u>	<u>3,901.00</u>	<u>5,278.00</u>
	\$4,855.50	\$27,642.00	\$32,497.50

By letter dated July 28, 1980, the Audit Division denied petitioner's claims for refund.

3. Petitioner is the wholly-owned subsidiary of John Blair & Company ("John Blair"). Its principal business activity is the marketing of newspaper inserts, which are newspaper supplements consisting of advertisements and coupons. Petitioner first became involved in this line of business in 1974 and 1975, during which years its sales were approximately 3 to 4 million dollars. Thereafter, its sales increased dramatically, from 13 million dollars in 1976 and 25 million dollars in 1977 to 100 million dollars in 1981.

4. Mr. Donald Hubert joined John Blair in 1975 as director of internal audit. In July, 1976, when petitioner discharged its comptroller, the president asked Mr. Hubert to recommend candidates for the position. Mr. Hubert recommended W. (the disclosure of W.'s name is unnecessary for purposes of this decision), with whom he had worked prior to joining John Blair.

Mr. Hubert knew W. as a "workaholic": "that was one of the very positive points about [him]. He would do the work of two or three people at times...".

W. had a degree in accounting and many years of experience. His former position was as chief accountant, where he had responsibility for, among other things, filing federal corporate returns. W. had no previous experience

in preparing state and local returns. However, in Mr. Hubert's opinion, such experience was unnecessary since federal returns were more complex.

The president interviewed W. and hired him.

5. In August, 1977 Mr. Hubert was promoted to the position of vice-president of finance in Marketing and became W.'s supervisor.

6. Soon thereafter, W. began to experience problems with alcoholism, though he had been a recovered alcoholic and an active member in Alcoholics Anonymous. He was also hospitalized for approximately 6 months for a kidney operation.

According to Mr. Hubert, W. was still "doing his job to a point". But because W.'s absenteeism became problematic and petitioner's sales were rapidly increasing, Mr. Hubert hired employees to assist W.

7. Mr. Hubert was preoccupied with the company's rapid growth, and since the corporate financial statements were being submitted in a timely manner, he did not question W.'s competence.

8. In November, 1979, John Blair began negotiations with Prudential Life Insurance Company for a 10 million-dollar loan. As part of its due diligence investigation, the lender (with the parent corporation's consent) made inquiries regarding John Blair's tax compliance record. The Department of Taxation and Finance notified the lender that petitioner had neglected to file franchise tax reports for 4 years.

9. Mr. Hubert confronted W., who after searching petitioner's records, admitted that franchise tax reports had not been filed.

W. had prepared the federal returns each year and forwarded them to the parent corporation, which then prepared and filed a consolidated return encompassing petitioner and other subsidiaries. W. assumed that the state

return was prepared by the parent in a similar manner, presumably from the information contained in petitioner's federal return.

In fact, the policy of the parent corporation was to require each subsidiary to prepare and submit its own state and local tax returns; and W.'s predecessor had filed various state and city returns.

10. Mr. Hubert immediately fired W. and ordered preparation of the 4 delinquent tax returns. He flew to Albany and personally submitted the returns with payment to the Audit Division. Mr. Hubert stated that under ordinary circumstances, petitioner would not have paid penalties; it did so only in order that the lender would approve the loan to John Blair.

11. Mr. Hubert stated that his review of the corporate financial statements had not previously disclosed the non-payment of franchise taxes, because the tax accrual embraced taxes of all types (income, sales, occupancy, etc.) for all jurisdictions.

12. John Blair has retained the services of Touche Ross & Co. for at least the past 20 years. In the audit of the John Blair consolidated financial statements, all state tax liabilities are grouped and checked through an effective rate computation; the effective state tax rates consistently fell within acceptable guidelines. Petitioner's failure to pay New York franchise taxes was not revealed due to the de minimis amount of such taxes in comparison with John Blair's total tax liabilities. Touche Ross also found John Blair's record of timely filing and payment to be unusually good.

#### CONCLUSIONS OF LAW

A. That paragraphs (1) through (3) of subdivision (1) of section 1085 of the Tax Law levy penalties for failure to file franchise tax reports and to pay

the amounts shown or required to be shown thereon in a timely manner, unless "such failure is due to reasonable cause and not due to willful neglect".

B. That 20 NYCRR 9-1.5, effective for taxable years commencing on or after January 1, 1976, states that grounds for reasonable cause must be clearly established and may include the following:

"(1) death or serious illness of the responsible officer or employee of the taxpayer, or his unavoidable absence from his usual place of business;

"(2) destruction of the taxpayer's place of business or business records by fire or other casualty;

"(3) reliance on advice of a competent advisor such as an attorney or accountant;

"(4) timely prepared reports misplaced by a responsible employee and discovered after the due date."

The above-quoted regulation was amended, effective April 1, 1981, to delete the third ground and to add the following grounds:

"inability to obtain and assemble essential information required for the preparation of a complete return despite reasonable efforts;

"pending petition to Tax Commission or formal hearing proceedings involving a question or issue affecting the computation of tax for the year of delinquency;

"any other cause for delinquency which appears to a person of ordinary prudence and intelligence as a reasonable cause for delay in filing a return and which clearly indicates an absence of gross negligence or willful intent to disobey the taxing statutes. Past performance should be taken into account."

C. That subdivision (c) of section 1085, which levies penalties for failure to timely file a declaration of estimated tax and timely pay installments, contains no provision for waiver of such penalties on account of reasonable cause.

D. That each taxpayer has the obligation to prepare and file a timely return with payment. This duty is nondelegable. Thus, numerous cases have

held that a taxpayer's reliance on its accountant or employee will not relieve the taxpayer of its responsibility. E.g., Sanderling, Inc. v. Commissioner, 571 F.2d 174 (3d Cir. 1978); Logan Lumber Co. v. Commissioner, 365 F.2d 846 (5th Cir. 1966); William H. Mauldin, 60 T.C. 749 (1973); 3 A.L.R.2d 619. Nor can the taxpayer escape responsibility by reason of the illness or hospitalization of its accountant or employee. Leon Faulkner, 40 T.C.M. 1 (1980); Estate of Abraham T. Klein, 34 T.C.M. 567 (1975). "[The officers and directors] mention his poor physical condition but they were well aware of that at all times and if he was incompetent they did not exercise ordinary business care and prudence in failing to obtain and follow competent advice and assistance." Robinson's Dairy, Inc., 35 T.C. 601, 608 (1961).

E. That petitioner has failed in more than one regard to exercise ordinary business care and prudence. It engaged the services of an accountant who had no prior experience with state returns. It apparently neglected to instruct him that the filing of such state returns was his responsibility, and not that of the parent corporation. And with full knowledge that state franchise tax returns are required to be filed on an annual basis, and full awareness of its accountant's medical and alcoholism problems, it never took any steps to assure or verify that the returns were filed on schedule.

F. That the petition of John Blair Marketing, Inc. is hereby denied in all respects.

DATED: Albany, New York

MAR 26 1982

STATE TAX COMMISSION  
James G. Teller  
PRESIDENT  
Francis R. Koenig  
COMMISSIONER  
Mark J. Smith  
COMMISSIONER